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THE FORUM, CARLISLE, PA.

OPENING OF THE TERM.

The opening exercises of the school, for the 1900 and 1901 terms, were held in the large lecture room, on October 3, at 3 P. M.

The members of the Faculty who were present were:—Dr. Geo. Edward Reed, Pres. of the Board of Incorporators; Dr. William Trickett, Dean of the School; Prof. Frederick C. Woodward, Prof. S. B. Sadler, Major Jas E. Pilcher, U. S. A.; Prof. Geo. Edward Mills, Hon. Jas. M. Weakley.

The condition of the school is indeed encouraging. The fifty new students who matriculated for the year were beyond the expectations of the Faculty. The Senior class numbers twice as many as the last year's class, and is the largest in the history of the school. This will certainly be gratifying news to the friends of the school.

Dr. Reed, President of the Board of Incorporators, made the opening address, in which he exhorted the student body in general to retain a clean record and an unstained character while in the school and in after life. He also referred to the amount of time that was squandered by the loitering of students at the several cigar stores of the town and exhorted them to economise time. In conclusion he extended a hearty welcome in the name of the whole college.

Dr. Trickett then addressed the students and gave a few regulations and rules of the institution, announced the schedule and assigned readings in the text-books.

Major Pilcher was then introduced and after indulging in a few pleasantries, exhorted the student of law as well as the practitioner to enter the field of politics; stating that they were the men to whom the country looks for its legislation, and that the lawyer was the one who was prepared for that work.

The remaining members of the Law Faculty assigned readings in the text-books for the first class meetings in their respective courses.

As a whole, the opening exercises were very enjoyable, and the speeches were freely sprinkled with wit, which elicited the applause of the student body.

The exercises were then closed by Dr. Reed, giving a few words of encouragement to the new students.

SCHOOL NOTES.

Many improvements have been made in and about the building during the past summer. The interior has been papered and painted throughout. The recitation rooms and the library have engaged the special attention of the decorator. The rooms have certainly been improved greatly by the use of paper and paint, and have been made more inviting than heretofore.

The library has been augmented by the addition of the Ohio Reports and the third set of Pennsylvania Reports, which, indeed, is a very valuable accession. Heretofore there had been only one set of Pennsylvania Reports, but the increase in the number of students during the past few years, and the inconvenience experienced by the students, have caused the Faculty to procure the two extra sets, to expedite research in those Reports.

It has been requested that the attention of the student body be called to the use of the books in the library. Should you take a book from the shelves, after consulting it you would confer a great favor to the one who may have cause to consult the same volume, by replacing it upon the shelf, instead of laying it on the table. By so doing you save the time of others when they desire the same book, for they can take it from the shelf immediately instead of being compelled to consume from ten to twenty minutes' search, and the use of strong adjectives during the search, over the piles on the tables.

We suggest that the students should read the advertisements in THE FORUM, and patronize the business men of the city who have been kind enough to give us their ads., and in that way assist in sustaining the same. They are all reliable and progressive men, and as they have been kind enough to extend their patronage to the Law School in the shape of advertising in THE FORUM, it is but just that in return the men of the school should extend a reciprocal courtesy toward these gentlemen. It is to be hoped that the men will assist those who assist THE FORUM.

DELTA CHI FRATERNITY.

The following resolutions on the death of Christian E. Lauer were passed by the Delta Chi Fraternity:

WHEREAS, Christian Ellis Lauer, a member of the Delta Chi Fraternity, has, through the wisdom of God, been summoned from this earth.

Be it Resolved, That by his sad and untimely death we suffer the loss of one whose nobility of character made him a faithful friend and a loyal and earnest fraternity brother, and whose industry, modesty and integrity won the admiration of all of his fellow-students. His memory will ever be cherished, and the influence of his example will long be felt among us.

Be it further Resolved, That copies of these resolutions be sent to the several Chapters of the Fraternity; that they be placed upon the minutes of Dickinson Chapter; and printed in THE FORUM.

BY THE COMMITTEE.

THE ALLISON SOCIETY.

It is encouraging to note the great interest manifested by the members of the society in all its departments thus early in the term.

The greatest harmony prevails and the indications point toward the most successful year in the society's history. The first meeting of the year was held on Oct. 4, the main purpose being for the appointment of a committee to draw up resolutions relative to the death of our deceased member, Christian E. Lauer. In the absence of any set program, extemporaneous speeches were called for and responded to by both old members and visitors.

At the meeting of Oct. 12, the proposition "Resolved, That a strike is the best method available for the working men to secure adjustment of labor troubles," was ably debated, the judges deciding in favor of the negative.

A general debate followed on "The Issues and Candidates of 1900," which aroused intense excitement.

For the next three meetings of the society the novel and interesting plan prepared by the executive committee has excited great interest among the membership. The carrying on, in all its details, of the regular work of a legislative body is proving of great benefit to all. The program, as prepared, gives every member of the society an equal chance to participate and enables all to learn something about practical legislation. Committes are appointed by the speaker of the House, bills introduced, debates held, and parliamentary procedure is rigidly enforced.

The entire plan of holding sessions of a House of Representatives has proved of value to the members and been the undoubted means of increasing the interest in the society.

The society has made many valuable acquisitions in its membership this year. The following is a list of new men admitted up to this time:—Phillips, Walsh, Cooper, Devor, Cannon, Kline, Rogers, Core, Donohue, Helriegel, Lonergen, McKeehan, McIntire, Kaufman, Drumheller, Shomo, Lauer, Shuman, Crary, Mays.

Resolutions of Respect and Condolence.

The Allison Literary Society of the Dickinson School of Law, desiring to express our appreciation of the character, attainments and moral worth of our late fellow member, Christian E. Lauer, resolve:

1. That we deplore the untimely death of our late associate, whose many sterling qualities of heart and mind won our respect and admiration while he was one of our number, and whose memory we will always gratefully cherish.

2. That we recognized in the student life of Mr. Lauer the promise of a career of honorable achievement and usefulness; of eminence in the profession he was striving to enter; and of an after-life bright with the confidence and high regard of all who might have the good fortune to know him.

3. That in the death of Mr. Lauer, the Allison Literary Society has lost one of its brightest members, whose ability, industry and perseverance stimulated us to increased effort and nobler purpose and gave character and prestige to our association.

4. That we tender to the bereaved family of Mr. Lauer our sincere sympathy and invoke for them the support of that Divine Power, whose mercies are boundless and whose love is a fortress and strong defence for all who trust in Him.

5. That these resolutions be spread at length on the minutes of the Society and that a copy thereof be presented to the family of our late associate and that they be furnished for publication in THE FORUM.

THE DICKINSON SOCIETY.

The Dickinson Society has begun its year's work under auspicious circumstances. That kind of zeal which manifests itself in work has not been found wanting. The Junior members have already proved themselves a valuable accession.

The first meeting, held within a few days after school opened, was, nevertheless, one of much interest. A debate by Messrs. Hess, Davis, Trude and Osborne, involving a discussion of "Expansion," an oration by Mr. Henderson, and a recitation by Mr. W. T. Stauffer, formed the chief literary features of the program. Violin music, rendered by Mr. Stauffer, formed a pleasing feature.

The second meeting was devoted to politics. The problems of government, which are at present well recognized under the nomenclature of "Trusts" and "Expansion," were discussed with considerable accuracy and much interest. Mr. F. H. Rhodes and Mr. John D. Brooks presented the opposing theories with respect to the extension of Uncle Sam's control over foreign territory. Mr. Claycomb spoke at some length on the "Trust" evil. The questions were then open for general discussion, and several enthusiasts arose to support their respective parties and principles with much fervor and intense argument.

The paramount aim of this society is to give to its members a training in the practice of public speaking, and a successful year's work along this line may reasonably be expected.

The following is the arrangement of lectures for this term:

	MONDAY.	TUESDAY.	WEDNESDAY.	THURSDAY.	FRIDAY.
JUNIOR CLASS.	Real Prop., 8.20 Crim. Law, 1.30 Blackstone, 2.30	Real Prop., 8.20 Crim. Law, 1.30	Contracts, 8.20 Torts, 11.00 Crim. Law, 1.30	Contracts, 10 30 Real Prop., 11.30 Torts, 2.30	Torts, 10.30
MIDDLE CLASS.	Sales, 8.20 Evidence, 10.30 Blackstone, 2.30	Sales, 8.20 Evidence, 10.30 Practice, 2.30	Real Prop., 8.20 Sales, 9.30	Real Prop., 8.20 Equity, 2.30	Real Prop., 8.20 Equity, 2.30
SENIOR CLASS.	Cons. Law, 9.30 Quasi-Con.,1 1.15 Med. Juris., 2.30	Cons. Law, 9.30 Quasi-Con., 11.15	Wills, 9.30 Practice, 2.30	Wills, 9.30 Partnership, 1.30	Wills, 9.30 Partnership, 1.30

ALUMNI NOTES.

John G. Miller, '00, has been admitted to the Centre county Bar and also the York county Bar during the past summer. He has opened an office in the city of York.

Geo. W. Aubrey, '00, was recently admitted without examination to practice in the several courts of Lehigh county.

W. Ernest Shaffer, of this place, was admitted to practice law in the several courts of this county, on Tuesday. He is a graduate of the Dickinson School of Law, and will be associated in the conduct of his business with an eminent legal counsellor in the person of Henry T. Harvey, Esq., of Lock Haven. Mr. Shaffer will shortly open an office in Renovo.—*The Renovo Record*, Sept. 28, 1900.

H. Stanley Winlack, '00, passed a creditable examination before the Bar Committee of Bradford county for admission to said Bar.

Michael J. Ryan, '00, is employed in the office of John Dolphin, a prominent attorney in Mahanoy City.

Miles H. Murr, '00, has opened an office in Cedar Rapids, Iowa.

J. Austin Sullivan, '98, was admitted to the Blair county Bar during the past summer. The Examining Board commended him on his excellent examination.

W. Brooke Yeager, '00, was admitted quite recently to the Luzerne county Bar.

Harry C. Hubler, '99, has been admitted during the past summer to the Northumberland county Bar.

J. Banks Ralston, '00, was admitted quite recently to practice in the several courts of Cumberland county.

Aaron Light, who has been a member of the class of '01, enlisted in the U. S. Marines quite recently.

Leon C. Prince, '99, has been elected to the librarianship of the college, and is also assisting his father, Prof. Morris W. Prince, S. T. D., who holds the chair of Political Science and History in the same institution.

Robert P. Stewart, '00, has entered the office of a prominent politician in Deadwood, South Dakota.

A. Newton Wallace, '00, has located at Cripple Creek, Colorado.

Eugene D. Siegrist, '99, was admitted to practice in the several courts of Lebanon county.

The following familiar faces were seen in town during the past few weeks: Jas. B. O'Keefe, '00; Miss Sara M. Marvel, '00; Lawrence M. Sebring, '00; Dalbys Fickes, '97; Wilson S. Rothermel, '00; Charles A. Shambaugh, '98; Horatio W. Russell, '00; Harry M. Collins, '00, and G. Arthur Bolte, '00.

The Middle class has effected the following organization: President, William H. Trude; vice-president, Robert K. MacConnell; recording secretary, William S.

Detrich; treasurer, John N. Minnich. The class also drew up the following:

Resolutions of condolence adopted by the Middle class of the Dickinson School of Law, of Carlisle, Pa., October 12, A. D. 1900, on account of the death of their esteemed classmate, the late lamented Christian E. Lauer, of Blandon, Berks county, Pa.:

WHEREAS, It hath pleased the Almighty God, the Great Ruler of the Universe, in His all-wise and unerring judgment, to cause to be removed from amongst us our highly esteemed classmate, Christian E. Lauer

AND WHEREAS, The gentlemanly conduct, studious, quiet and unassuming manner of our late classmate, his earnest devotion to his duties and to his associates had endeared him to and caused him to be beloved by us all, so that his sad and untimely death has cast over us a deep gloom; therefore, be it

Resolved, That we, the members of the Middle class of the Dickinson School of Law, take this method of expressing our great grief occasioned by the sad and terrible death of our beloved classmate. That, while we bow in humble submission to the will of the Supreme Deity, whose handiwork we all are, knowing that "He doeth all things well," we trust that our great loss may be the infinite gain of our beloved comrade, who has departed from us, gone on that journey from whence no traveler ever returns. And be it further

Resolved, That we extend to the bereaved family of our late classmate our sincere and heartfelt sympathy, sorrow and regret, coupled with such consolation as our intimate knowledge of his exemplary life, our high regard for his Christian character and our intense admiration for his many manly qualities enables us to fittingly express.

Resolved, That these resolutions be spread at large on the class records, that they be printed in THE FORUM, and that copies thereof be forwarded to each of his two surviving brothers.

On Tuesday morning, October 9th, a mass meeting of the school was held in behalf of athletics. Prof. F. C. Woodward made a few brief remarks, followed by Sam Boyle, the coach of the foot ball team, and G. H. Bonner, manager. The proposition made by Mr. Bonner is as follows: That each man be taxed $4.00 each year, and paid as part of the tuition of the school, and in return be presented with a ticket to all the games played on the athletic field, both base ball and foot ball. He also urged the necessity of money for the use of athletics. After considerable discussion on the part of the students, it was decided that a committee be appointed to see the college board on athletics, and make arrangements for better representation on that committee. The students, as a rule, patronize the games on the home grounds, and probably would be willing to support the proposition offered above, provided the other grievances are amicably adjusted.

Prominent in this year's "'Varsity" foot ball team are Core, McGuffie, Phillips and Cannon, all of the Law School, and all of whom are brilliant players.

Dickinson may be said to have the best foot ball material she has ever had for many years. The line men are very heavy and quick and play with a great deal of snap. Although Sam Boyle, the coach, has been here but a few weeks he has brought the men out in excellent shape.

The following is a schedule of counsel in the Moot Court cases which have been given out up to time of going to press:

		PLAINTIFF.	DEFENDANT.
Case No.	1.	Clark, Boyer.	Deal, Davis.
" "	2.	Frank, Detrich.	Graul, Drumheller.
" "	3.	Alexander, Adamson.	Basehore, Barr.
" "	4.	Henderson, Edwards.	Harpel, Elmes.
" "	5.	Hess, Kostenbauder.	Halcolm, MacConnell.
" "	6.	Johnston, McIntyre.	Kennedy, Minnich.
" "	7.	Kern, Moon.	Kline, Nicholls.
" "	8.	Mitchell, Osborne.	Shipman, Points.
" "	9.	Piper, Rhodes, F.	Lightner, Rhodes, J.

Case No.	10.	Stauffer, Sterrett.	Valentine, Thorne.
"	" 11.	Turner, Brock.	Brooks, Lonergen.
		Stauffer, J.	
"	" 12.	Trude, Graul.	Alexander, Clark.
		Shipman, J.	
"	" 13.	Taylor, Basehore.	Frank, Henderson.
"	" 14.	Harpel, Johnston.	Hess, Holcomb.
"	" 15.	Kennedy, Piper.	Kern, Mitchell.
		Valentine, J.	
"	" 16.	Davis, Elmes.	Adamson, Kostenbauder.
"	" 17.	Valentine, Drumheller.	Shipman, MacConnell.
"	" 18.	Lightner, Detrich.	Stauffer, Edwards.
"	" 19.	Taylor, Minnich.	Barr, Boyer.

MOOT COURT.

STEVENS vs. BLACK.

Rights of a vendee under articles of agreement to sell real estate, upon condition.

STATEMENT OF THE CASE.

Black agreed to buy from Stevens a farm, on being told by Stevens that it was a healthy farm, and that there was coal under it in considerable quantities. Stevens, who was not personally acquainted with the farm, had been so informed. The farm was, however, very unhealthy, and there was no coal under it. Black informed Stevens that he would buy only because of the facts communicated to him. Subsequently, learning that the facts were otherwise, Black refused to accept the conveyance. The price to be paid was $4000. Assumpsit.

MINNICH and KOSTENBAUDER for plaintiff.

There was no fraud in the transaction and the defendant cannot rescind.—McFarland v. Newman, 9 Watts 55; McCandless v. Young, 96 Pa. 289; High v. Berret, 148 Pa. 261.

POINTS and NICHOLLS for defendant.

The purchase was made upon certain conditions which were not fulfilled and the purchaser is entitled to rescind.—Hexter v. Bast, 125 Pa. 72; Bannerman v. White, 10 C. B. (N. S.) 860; Holmes' Appeal, 77 Pa. 53.

OPINION OF THE COURT.

Black informed Stevens that he would buy the farm offered him by the latter for $4000, only because, as he was informed by Stevens, it was healthy, and was underlaid with coal in considerable quantities. It matters little whether we term the representations of Stevens conditions, or warranties. He understood that Black was engaging to pay him $4000 for his farm only on the condition that it had the properties attributed to it.

It in fact did not have these properties. It follows, we think, that even in an action for damages for Black's refusal to perform the contract, the defense made by him would be successful. He was bound, neither to pay the price, and accept the conveyance nor, refusing the conveyance, to pay any damages to Stevens.

But, this is an action, not for damages, but for the price. Although it is *assumpsit*, the defendant can make the same defense that would have been available, had the plaintiff resorted to a bill in equity. That the untruth of Stevens' representations whether deliberate and intentional, or not, would have defeated a bill, is not doubtful. Holmes' Appeal, 77 Pa. 50; Friend v. Lamb, 152 Pa. 529. And similar equitable defences are available in an action at law; Fisher v. Worrall, 5 W. & S. 478.

It is not important to determine whether the qualities of the land, insisted on by Black, were sufficiently important to justify a practical man in refusing to buy land which did not possess them. He chose to buy Stevens' land, because of, and only because of its hypothetical possession of them. He made Stevens aware that he was buying on this hypothesis. If Stevens did not wish to make the finality of the bargain dependent on the farm's possession of these qualities, he should have declined further to negotiate. But, in no view of the case, can it be said that the salubrity of the locality of a man's residence is a matter of inferior import-

ance. When Black bought the farm, he bought it with a view to residence upon it. Its unhealthfulness would have deterred him, altogether, if known to him, from entering into any negotiation for it.

The result we have reached does not depend on the honesty or dishonesty of Stevens in making the representations. He may have believed them true. The important matter for Black was, not Stevens' faith, but the actuality of the properties in which he professed to believe. Stevens may have supposed the farm healthful. But it was in fact "very unhealthy." Black's family, had it undertaken to reside on it, would have found Stevens' opinion a poor talisman against its malaria and miasmata. *Cf.* Blight v. Samson, 137 Pa. 368.

Therefore, gentlemen of the jury, if you find that Black's purchase was made on the stipulations with regard to healthfulness described by the witnesses, and that the farm is in fact "very unhealthy," your verdict should be for the defendant.

WILLIAMSON'S ESTATE.

Superior rights of beneficiary's estate in life insurance.

STATEMENT OF THE CASE.

John Williamson obtained a policy for $10,000 upon his life made payable to his wife Lucinda, her heirs, executors and administrators. Lucinda died before him leaving three children. After her death he assigned the policy to secure $2000, money borrowed by him at the time of the assignment to Amos Hooper. Without repaying the money he died four months after the assignment. The insurance company paid the $10,000 over to John Williamson's administrator. Claimants are his wife's administrator, his administrator and Hooper.

FRANTZ and TALBOT for estate of Lucinda Williamson.

Husband's administrator is not entitled to the insurance money.—8 W. N. C. 209; 13 W. N. C. 535.

Insured could not assign policy without consent of beneficiary.—Waltz v. Scott, 5 C. C. 208.

Policy for benefit of married woman to enure to her estate free from the claims of her husband's creditors. Act of May 1, 1876. 1 P. & L. 2383.

HEIST and CONRY for Amos Hooper.

"Heirs" is used as a word of limitation and the husband could dispose of the policy after his wife's death, she leaving no representatives entitled.

OPINION OF THE COURT.

The position of this case has materially changed by an admission of the counsel for the plaintiff, that the assignment to Amos Hooper by John Williamson was void and of no effect and that Hooper was not entitled to any part of the proceeds from the policy. As admissions of counsels are conclusive and binding upon the client, the court need not decide as to the validity of the assignment, and the part that Hooper would have taken in the distribution of proceeds from the policy. So, as the case now stands the persons who are claimants for the proceeds from the policy are the wife's (Lucinda's) administrators and John Williamson's administrators.

Now had Lucinda Williamson an absolute title in the policy on the life of her husband? The courts have held that she will be presumed to have an absolute title until the contrary is shown, Anderson's Estate, 85 Pa. 203, and the words, her heirs, executors and administrators, are further evidence of the kind of title the wife would take in the policy which would be an absolute one and not subject to any conditions, 83 Pa. 337, Deginther's Appeal. The question now is, who is to receive the money of the policy?

Lucinda having an absolute interest in the policy on the life of her husband and she dying before her husband, and his assignment to Hooper by admission of counsel being void and of no effect, would the interest pass to her administrators or to his administrators.

Mr. Justice Reed, speaking of policies of life insurance, said in Elliot's Appeal, 50 Pa. 75, that these policies were securities for money, valuable choses in action which may be sold at public or private sale, and are included in the general words personal property, and would pass under that head by deed or will. Now if they would pass by deed or will they would pass under the intestate law. Anderson's Appeal, 85 Pa. 203.

The legal title of personal property devolves upon the administrator as of the

date of the death of the owner, for the purpose of collection and of distribution among the parties entitled by virtue of the intestate law. The case as it now stands has therefore been decided in Mutual Aid Society v. Miller, 107 Pa. 162, and Andersons's Appeal, 85 Pa. 203. It seems clear from established precedent that the money from the policy would descend to her administrators and under the intestate law be distributed share and share alike between the children of said Lucinda and the husband's estate.

L. L. FRANK.

OPINION OF THE SUPERIOR COURT.

The case below presents a question of law which, so far as we now recall, has not yet been decided in this state. Consideration of it was declined by the learned judges of the court below, for the reason that counsel made an admission as to what the law was. We are not prepared to concede that, the facts appearing, the right of clients thereunder, may be sacrificed by the inadvertent or ignorant concessions of counsel. Facts may be taken as granted by attorneys, but it is not for the courts to evade the duty of applying the law to these facts merely because the attorneys, without investigation, or with incomplete and inconclusive investigation, tell them that the law is so and so.

The policy was obtained by John Williamson upon his own life, and was made payable to "his wife Lucinda, her heirs, executors and assigns." After her death, Williamson assigned the policy to Hooper, as security for $2000, money lent by the latter to him. Williamson has died without repaying the loan. The company has paid the money to the administrator of John Williamson. The questions are, has he a right to retain it, as against the administrator of Lucinda Williamson, or as against Hooper the assignee.

That the administrator of Lucinda is entitled to it, as against the husband's administrator is entirely clear. The cases cited by the learned court below explicitly affirm or presuppose this right. Society v. Miller, 107 Pa. 162; Deginther's Appeal, 83 Pa. 337. The Act of April 15th, 1868, 1 P. & L. 2383, declares that "all policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken out for the benefit of * * the wife or children * * shall be vested in such wife or children * * free and clear from all claims of the creditors of such person." The same policy is expressed in the act of May 1st, 1876 *supra*. The cases cited and others show that the death of the wife, for whose benefit the policy is procured, before the husband, does not affect her estate in it, and that it passes to her executor or administrator, becoming payable to him, on the happening of the death of the husband.

Has then the husband the right to assign the policy after the decease of his wife? It would hardly be suspected that he had such a right, had all the payments upon it been made before her death. It does not appear in this case, whether he paid any premiums after her death or not. We will assume that he did. He was under no contract to pay these premiums. He might have refrained, and had he refrained, the policy, perhaps would have been voidable, though this does not appear in the case. Does then the fact that the policy will lapse, unless premiums are paid, and that the lapse is prevented solely by payments of premiums voluntarily paid by the husband, after his wife's death, authorize him, on paying such premiums to appropriate the policy to himself, by assigning it for a consideration?

The act of May 1st, 1876, 1 P. & L. 2383, enacts that "A policy of insurance, issued by any company incorporated under this act, on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband or any other person, shall enure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall enure to their benefit." The policy is to enure to the wife's separate use and benefit, and that of her children, "independently of her husband, or his creditors." It is not his, nor theirs. At most, premiums paid to procure the policy or to perpetuate it, with interest, shall enure to the benefit of the creditors, but this is only

when they have been paid with intent to defraud. It does not appear that any premiums have been paid by Williamson, with intent to defraud his creditors. And it is clear that one who becomes a creditor, knowing that the policy which he accepts as collateral security, is payable to the wife, cannot be defrauded by any payments of premiums which may have been already made, or which may be made subsequently.

"We apprehend the general rule to be," says Bliss, Life Ins., section 318 "that a policy and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. The legal representatives of the insurance have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else." Bacon, Benefit Societies, p. 444; Biddle, Ins. 278, 282; Pingrey v. National Life Ins. Co. 144 Mass. 381; Chopin v. Fallows, 36 Conn. 132; Ferndon v. Carefield, 104 N. Y. 143. The cases holding the opposite are not convincing.

No reason therefore appears for denying to the administrator of Lucinda Williamson the insurance money, and the appeal from the decree of the court below is dismissed.

JOHNSON vs. JAMES.

Easement by prescription.

STATEMENT OF THE CASE.

Johnson and James owned farms adjoining, that of the former lying on a highway (A), and that of the other on another (B). A lane ran across both farms, connecting the two highways, Johnson using the part on James' farm in order to reach the highway (B), and James' part on Johnson's in order to reach the highway (A). The land had been in this condition for thirty years, when James put a fence across it at the boundary between the farms, and so prevented Johnson's further use of it.

This action is brought for damages. Plaintiff offered to show (1) that predecessors of both parties using the land orally agreed to lay out the lane for the use of both. (2). Also, that Jacob Todd, a former owner of James' land, had stated to witness, the then owner of Johnson's land had a right of passage across his land. James bought the land from Todd, but had no knowledge of the alleged declaration of Todd. It was shown that during the thirty years Johnson, and those who preceded him in the ownership, had used the lane on James' land whenever they desired, without asking leave and without challenge. Evidence (1 and 2) was excluded. The court instructed the jury that there was no sufficient evidence of grant or of right from user. Motion for a new trial.

RHODES and DETRICH for plaintiff.

An admission of a right of way by a previous owner of a servient estate is competent evidence against a subsequent owner. Bennett v. Biddle, 150 Pa. 420. Whether or not an easement had been established should have been left to the jury. Susquehanna Coal Co. v. 61 Pa. 328; Gebman v. Erdman, 105 Pa. 371.

CLIPPINGER and KATZ for defendant.

OPINION OF THE COURT.

The plaintiff's motion for a new trial is based upon three grounds; first, that the evidence of an oral agreement between predecessors of the parties to lay out the lane for the use of both, should not have been excluded; second, that the declaration of Jacob Todd, a former owner of James' land, to the effect that the then owner of Johnson's land had a right of passage across his land, should not have been excluded; third, that the court erred in giving to the jury binding instructions in favor of the defendant. We shall consider these three points in the order named.

I. The nature of the alleged oral agreement between predecessors of the parties does not clearly appear. If the agreement had been offered by the defendant as evidence that the use of the lane was originally permissive, and not adverse, it would have been admissible. But the plaintiff seems to have offered it as evidence of an *easement*, and since it is well settled that an easement cannot be established by parol evidence, the offer was properly re-

jected. Huff v. McCauley, 53 Pa. 210; Geakle v. Jacob, 9 Casey 376.

II. The declaration of Todd, though little more than an expression of opinion, was at least slight evidence of the nature of plaintiff's uses, and should have been admitted. Bennett v. Biddle, 150 Pa. 420.

III. The court was unquestionably in error in giving binding instructions for the defendant. When, as in this case, one uses a road over the lands of another for a period of twenty-one years without asking leave, and without objection, a grant is presumed. Garrett v. Jackson, 20 Pa. 331. That presumption may be rebutted by showing the use to have been subservient rather than adverse to the right of the owner. In this case it appears that the road or lane connecting the two highways has been a mutual convenience to the owners of the two farms. That fact may be regarded as persuasive in some degree to the view that the use by each has been merely permissive, and not adverse. But, surely, it does not place the matter beyond the realm of doubt, and consequently the question should have been submitted to the jury. In Bennett v. Biddle, 140 Pa. 396, the facts were similar to these before us, although the evidence that the user of the plaintiff was permissive, and not adverse, was somewhat stronger, since there the persons who laid out and originally used the lane connecting the two highways were brothers. Said the court in that case: "What the fact was as to the beginning and continuance of travel between these owners was for the jury. They must determine whether the user has been a friendly exchange of advantages, or whether each has entered and exercised a right of passage adversely to the other. In the latter case only would lapse of time give title."

Motion for new trial granted.

JOHN WARNER vs. AARON HOPKINS.

Ejectment.

STATEMENT OF THE CASE.

Hopkins, on July 7, 1894, by articles, sold two houses in Mechanicsburg to Warner for $2,000 each, payable one year after the date of the contract, and Warner was put in possession. The money was never paid. In 1896, on May 11th, Hopkins resolved to repossess himself of the premises. One of the houses was vacant. He *unlocked* the front door and entered, and placed a tenant in possession. The other was occupied by Warner himself. He entered the house with Warner's permission, but, when in, informed Warner that he must leave, and, with a servant, set out the furniture on to the street, Warner making no resistance, but tendering the money due. Warner brings this ejectment for the two houses.

ROTHERMEL and WALLACE for the plaintiff.

1. When a vendee, fairly in possession of and under articles of purchase, is ousted by stealth, trick or fraud on the part of the vendor, the vendee is entitled to recover in an action of ejectment without making a tender of the unpaid purchase money. D'Arras v. Keyser, 26 Pa. 249.

2. The defendant cannot be said to have gained peaceable possession. Act of March 31, 1860; Com. v. Conway, 1 Brewst. 509; Com. v. Johnson, 3 C. C. 641; D'Arras v. Keyser, 26 Pa. 249.

SLOAN and LAVENS for the defendant.

1. Right of entry for breach of condition in a deed may be enforced if claimed within a reasonable time. Coal and Navigation Co. v. Early, 162 Pa. 338.

2. When vendor's possession is lawful, vendee cannot maintain action of ejectment without making a tender of the unpaid purchase money in court. Bell v. Clark, 111 Pa. 92; Vincent v. Huff, 4 S. & R. 298; Brindle v. McIlvaine, 7 S. & R. 345.

OPINION OF THE COURT.

The proposition is thoroughly established by authority, that a vendee once fairly in possession of land under articles of purchase, but ousted by force or fraud by the vendor, is entitled to recover in an action of ejectment, without making a tender of the unpaid purchase money. D'Arras v. Keyser, 26 Pa. 249. But it is equally clear that when the vendee fails to pay the purchase price within the time fixed by the articles, and the vendor thereupon peaceably retakes possession of the premises, ejectment will not lie, unless tender is first made of the unpaid purchase money. Bell v. Clark, 111 Pa. 92. In that case the court said that the rule might be stated thus: "When the possession of the vendor is lawful, his vendee cannot maintain ejectment against him without

proof of a previous tender of the purchase money, and he must also maintain that tender by producing that money in court." The reason for the rule is that under such circumstances the action of ejectment is in the nature of a bill for specific performance of the contract to sell (Rennyson v. Rozell, 106 Pa. 407), and it is familiar law that specific performance of such a contract will not be enforced unless tender is first made by the vendee. Vincent v. Huff, 4 S. & R. 298; Brindle v. McIlvaine, 7 S. & R. 345.

In the case at bar, the vendee did not make tender in court, and it does not appear that he made it at any previous time. It is contended, however, that the possession of the defendant is not lawful; that his entry was effected by force and fraud. The evidence does not support such a conclusion. One of the houses sold he found vacant, and opening the door he placed a tenant in possession. These are the precise circumstances of the entry in the case of Bell v. Clark, *supra*, where the vendor's possession was declared to be lawful. The other house was occupied by the vendee himself. Defendant knocked at the door, and being admitted, demanded possession. Plaintiff offered not a single word of protest, and permitted defendant to remove his goods. Such conduct, we think, may fairly be regarded as an acquiescence in defendant's right to retake possession. Certainly, defendant's act cannot be construed to be an entry by force or fraud. It does not appear that he had the slightest intention of using force, or even of resorting to legal process, in case plaintiff refused to peaceably surrender possession to him.

Judgment for defendant.

REBECCA BROWN vs. JNO. CLARK.

STATEMENT OF THE CASE.

Wm. Clark, living with his invalid wife on a large farm owned by Clark, contracted with his daughter, Mrs. Brown, that she come and live with him and take care of Mrs. Clark, who was not expected to live many days. At the end of one year Wm. Clark would give her the deed of the farm, he to live with her thereafter. The daughter came, bringing with her her husband and two sons, who at no time contributed anything towards the family expenses. Clark's pension and the income of the farm was the only means of support. Four months after moving to her father's she demanded the deed and was refused; she then left the farm and brings an action for services rendered. Can she recover?

BARR and JOS. RHODES for plaintiff.

When a special contract has not been fully performed, but the plaintiff has, in good faith, done what he believed to be in compliance with the contract, and thus rendered a benefit to the defendant, he may recover the value of his services. Hayward v. Leonard, 7 Pick, 181; Denham v. Bryant, 141 Mass. 27; Blood v. Wilson, 139 Mass. 110.

DRUMHELLER and LEE for defendant.

The contract is entire and the plaintiff, having shown only partial performance, can recover nothing. 151 Pa. 534; 8 W. & S. 367; 66 Pa. 351; 3 Harris, 351; 1 W. & S. 301; 2 Pa. 454; 10 Barr, 231.

OPINION OF THE COURT.

A contract between Wm. Clark and his daughter, Mrs. Brown, was entered into. Of her, it required that she go to the farm on which Clark resided, and with her husband and two sons take up her abode there, and take care of Mrs. Clark, an invalid, whose death in a few days was expected, and remain on the farm. She was also to permit her father to live with her thereafter, and doubtless to take such care of him as the filial instincts of a daughter, with whom her father resides, prompts her to render. On the other hand, the contract required Clark to convey the farm to Mrs. Brown at the end of one year after the commencement of her residence on it.

The daughter moved with her family on the farm, but, instead of remaining on it until the end of a year and beyond, left when four months afterwards, on her demanding a deed, her father refused to give it to her. Meantime, she had contributed nothing to the support of the family, Clark's pension and income from the farm furnishing all that was consumed by it. Refused the deed, the daughter with her family left the farm and brought this action for compensation for alleged services rendered.

There was, it thus appears, an express contract. The daughter was to remain on the farm for a year and more, and her re-

ward was to be the conveyance at the end of the year. She remained but four months, and then demanded the deed. She had no right to it. The refusal of her father to deliver it was no wrong to her, and no justification for her leaving the farm. She contracted to earn the deed in a certain way. She has chosen not to earn it. She did not contract to earn any other form of compensation. We have discovered nothing that could make the father liable to her for services rendered by her under a contract that only when they were continued was she to be rewarded, and then only with the land. It would be perilous to make a contract if one of the parties, inexcusably ceasing to perform in the midst of performance, could compel the other to accept the incomplete service, and pay for it against his intention and expectation.

On the case stated judgment must be for the defendant.

JOHN McKEAN vs. SAMUEL OLIPHANT & GEORGE TITLOW.

STATEMENT OF THE CASE.

Titlow and Belmont were a firm carrying on under the name of Titlow & Co. the building business, and Titlow, using the firm name ordered lumber, $800 worth, from McKean. Oliphant had on several occasions aided Titlow & Co. with money and by becoming surety in purchases. On two or three occasions, he had united with Titlow in contracts and notes, in which he and Titlow described themselves as Titlow & Co. McKean knew that Titlow was of the firm to which he sold lumber, but he did not know who the other member was. The note he received for the lumber was written by Titlow, and signed Titlow & Co. Being unpaid, McKean sues on it Oliphant & Titlow, trading as Titlow & Co.

DAVIS and DETRICH for the plaintiff.

(1) The record should be so amended as to substitute the name of Belmont for that of Oliphant, which can be done by the court on application.—2 P. & L. Dig. 3632; Donckmiller v. Young, 27 Pa. 97; Haskinson v. Eliot, 62 Pa. 393; Fidler v. Hershey, 90 Pa. 363.

(2) A firm is liable for whatever is done by any of the partners acting for the firm.—Lindley on Partnership, No. 160; Bank v. Gore & Grafton, 15 Mass. 80; Evans v. Watts 192 Pa. 112; Huffman Form Co. v. Rush, 173 Pa. 264; Rice v. Johnson, 171 Pa. 89.

BOYER and DEEBLE for defendant.

(1) Oliphant cannot be made a defendant in this action, since there is no evidence that McKean relied upon the credit of Oliphant as partner in effecting the sale.—Dunham v. Rogers, 1 Pa. 255; Erwin v. Budwell, 72 Pa. 244; Hart v. Kelley, 83 Pa. 286.

(2) Oliphant cannot be made liable under the principle of estoppel since there is no proof that he publicly held himself out as partner, or made specific declarations to that effect to the plaintiff.—41 Pa. 30; 3 Watts 101; 63 Pa. 97; 3 Phila. 298.

OPINION OF THE COURT.

Oliphant was not a member of the firm of Titlow & Co., but did he hold himself out as a member of the said firm in such manner as to justify the belief on the part of McKean that such was the case, and by reason of this was credit given to the firm for the lumber sold by the plaintiff? This is the question for determination.

From the mere loan of money to a firm or becoming its surety, the inference would not be justified that the lender or surety was a member thereof. The mere fact that on two or three occasions Oliphant had united with Titlow in contracts and notes in which he and the latter designated themselves as Titlow & Co. would not in the absence of proof that these transactions were brought to the knowledge of McKean be held to have influenced him in giving the credit to Titlow & Co. It does not appear that the plaintiff ever discussed with Oliphant what business relations, if any, existed between him and Titlow. It is not alleged that Oliphant made any declaration or did any act in the presence of McKean which was likely to lead him to conclude that he, Oliphant, was a member of the firm of Titlow & Co., nor does it appear that he gave the credit by reason of such a belief.

While it is true that a man who is not a member of a firm, may become answerable by holding himself out as a partner, yet to enforce liability it must be shown that he held himself out as a partner under circumstances of publicity which justified the belief that the plaintiff knew and acted on his declarations, or by proof of specific

declarations made to the plaintiff and credit given in pursuance thereof by the latter.—Johnson v. Warden, 3 Watts 101; Cirk v. Hartman & Co., 63 Pa. 97; Craig v. Warner, 3 Phila. 298.

"The evidence from which you would have to find that he so held himself and acted as a partner must be his acts in connection with the circumstances which were known to the plaintiff when they gave credit, and not only must his acts have been such as to justify reasonable belief that he was a partner, but to hold him on that account, you must further find as a matter of fact that they gave him credit as such, because if they did not, his holding himself out as a partner would do them no harm."

This instruction to the jury was held to be a correct statement of the law in Burgan v. Cahoon, 1 Pennypacker 320.

Justice Paxton delivering the opinion in the case of Denihorn v. Hook, 112 Pa. 243 declared, after citing with approval the determination in Burgan v. Cahoon, *supra*, "this proposition of law is accurate as stated and supported by abundant authority."

"Before a party can charge an alleged firm, or a person who has been held out to the world as a partner, the party seeking to charge them must have had knowledge of such fact and given credit upon the the faith of it." Ibid.

The plaintiff is not entitled to recover against Oliphant and the action being against joint defendants, no recovery can be had in this action against either.

WM. MARTIN vs. MILES FISSEL.

Action of assumpsit.

STATEMENT OF THE CASE.

On February 1, 1895, a note for $1,000, due by defendant to plaintiff, became payable. The statute provided action should be brought within six years. On July 1, 1897, a statute was passed providing that such action should be brought within three years after the cause of action has accrued, and it was further provided that this should be effective in all cases after December, 1897. In June, 1898, this action was brought. Fissel defends on ground that the action is barred by the statute.

DAUGHERTY and LEE for the plaintiff and appellant.

1. A statute of limitations not allowing reasonable time after its passage for the commencement of suits on existing causes of action is unconstitutional. Jackson vs. Lampshire, 4 Wheaton 207; Carl vs. Haggar, 8 Mass. 430.

2. Acts of Assembly destroying vested rights are unconstitutional. Van Horn vs. Dorrance, 2 Dallas 310; Norman vs. Hust, 5 W. & S. 171; Battam vs. John, 5 Barr 149.

FRANK and OSBORNE for appellee.

1. Retrospective law divesting vested rights, unless ex post facto or impairing obligation of contracts, is not unconstitutional. Lane vs. Nelson, 79 Pa. 407.

2. An enactment reducing the time prescribed by the Statute of Limitations in force when right accrued is not unconstitutional. Hawkins vs. Barney, 5 Peters 451; Jackson vs. Lampshire, 3 Peters 280; Sohn vs. Patterson, 84 U. S. 596.

OPINION OF THE COURT.

On February 1, 1895, when the note in this case became due, the statute of limitations allowed six years within which to bring suit. A little over two years later a statute was passed limiting the time to three years "after the cause of action has accrued," and further providing that "this should be effective in all cases after Dec. 1, 1897."

This action to collect the sum due by the note is brought in June, 1898. Thus, if the new statute of limitations is meant to apply and can properly apply to this case, the debt is barred.

The first question: Does the three year statute of limitations apply to this case? When the legislature directed that it "should be effective in all cases after Dec. 1, 1897," did it mean the statute to apply to all cases in which a right of action should afterwards accrue, or was it meant to apply to all cases in which an action should thereafter be brought? We are of opinion that it meant the latter.

There is a general presumption against the retrospective operation of statutes, and laws should never be considered as applying to cases which arose previously to their passage, unless the legislature have clearly declared such to be their intention. Taylor v. Mitchell, 57 Pa. 209; Eakin v. Raub, 12 S. & R. 330; Price v. Mott, 52 Pa. 315. But the force of this presumption is much lessened in the case of remedial statutes, and where such statutes do not

destroy all remedy they will be considered as applying to causes of action subsisting at the date of their passage. Endlich on Int. of Statutes, section 287, Kille v. Iron Works, 134 Pa. 225; Bates v. Cullum, 177 Pa. 633; Sohn v. Waterson, 17 Wall 596; Byers v. Penna. R. R. Co., 18 C. C. R. 187. The provision in the act suspending its operation for several months is indicative of an intention that it should apply to antecedent matters. Queen v. Leeds R'y Co., 83 E. C. L. 343.

If then the new statute of limitations is retrospective in its nature, does it, when applied to the present case, offend that constitutional provision which forbids legislation impairing the obligation of contracts? If it does not, then it is valid; for retrospective laws, divesting vested rights, unless *ex post facto* or impairing the obligation of contracts, do not fall within constitutional prohibitions. Lane v. Nelson, 79 Pa. 407; Grim v. Weissenburg School Dist., 57 Pa. 433.

In discussing this question it is to be noted that there is a distinction drawn between statutes which affect the obligation of a contract and those which affect or modify the remedy, merely. The legislature may enlarge or curtail the remedy to any extent, provided there still remains to the creditor an available remedy. The legislature may substitute one remedy for another, although the second remedy be not as convenient as the first. See Evans v. Montgomery, 4 W. & S. 220. "An act may reduce the period of limitation for bringing suit if it leaves a reasonable period for suits for breaches of existing contracts." Kenyon v. Stewart, 44 Pa. 179; Karn v. Browne, 64 Pa. 55; Wheeler v. Jackson, 137 U. S. 245; Terry v. Anderson, 95 U. S. 628; Metz v. Hipps, 96 Pa. 15; Smith v. Packard, 12 Wis. 412; Vance v. Vance, 108 U. S. 514.

Did the plaintiff in this case have a reasonable time within which to bring suit under the three-year statute? In answering this we must first decide when he had notice of the new statute. In the case of Price v. Hopkins, 13 Mich. 318, Justice Cooly lays down the rule that until the day when an act is to take effect arrives, the law has no force, even as notice to the persons to be affected by it. In stating this principle the court lays particular stress upon the fact that the constitution of Michigan contained a provision specifying that a particular time shall elapse between the passage of an act and its going into effect, unless the legislature shall otherwise direct. A contrary rule is found in the case of Smith v. Morrison, 22 Pick. 430. The latter case teaches that the public has notice of a statute from the date of its passage, and not from the date when it is limited to go into effect. This case is favorably commented upon in Karn v. Browne, 64 Pa. 58. See also Queen v. Leeds R'y Co., 83 E. C. L. 343. The position taken by these cases seems unassailable.

On July 1, 1897, then, the plaintiff had notice of the fact that the time for bringing suit had been shortened. Was this reasonable notice? The plaintiff had seven months, from July 1, 1897, to February 1, 1898, within which to commence suit before the statute could operate as a bar to his claim. There are numerous cases in which a nearly identical time has been held reasonable. Wheeler v. Jackson, 137 U. S. 245; Smith v. Morrison, 22 Pick. 430; Smith v. Packard, 12 Wis. 412; Terry v. Anderson, 95 U. S. 628.

The legislature has, in the act under discussion, specified the date when the act is to go into effect and has set that period at five month from the time of its passage. We cannot conceive why the legislature should postpone the operation of the statute, unless for the very purpose of affording all parties to be affected a time within which to bring suit before being barred by its provisions. If, then, the legislature has set a time, is it for us to dispute its propriety? If the time set were so unreasonably short as to practically destroy all remedy, and thus offend common sense or good conscience, we might have power to interfere; but, in general, the time set by the legislature must be followed. Smith v. Morrison, 22 Pick. 430; Karn v. Browne, 64 Pa. 58; Jackson v. Lamphire, 3 Pet. 280; Wheeler v. Jackson, 137 U. S. 256.

Applying the foregoing principles to the present case, we must decide that the Act of July 1, 1897, operates as a bar to the present action, and we therefore render judgment in favor of the defendant.

W. S. CLARKE, J.

OPINION OF SUPREME COURT.

The judges of the court below being equally divided in opinion as to the right of the plaintiff to recover, the judgment of the court was entered in favor of the defendant, and the plaintiff thereupon appeals to this court.

Both the judges seem to concur that the statute of July 1st, 1897, reducing the time within which action must be brought, is constitutional, but they differ as to the intention of the legislature to make it applicable to causes of action in existence and mature, when it was enacted.

The Act contains two provisions: (1) that all actions on promissory notes shall be brought within three years after they become payable, and (2) that the act should be effective in all cases, after December 1, 1897. But for the second of these provisions, it might be doubtful whether the act was intended to apply to cases already in existence, but it is impossible to avoid the inference that the object of the second provision was to make the act in all cases operative, after December 1, 1897, even though the cases had begun before July 1, 1897. *Cf.* Gilbert v. Ackerman, 159 N. Y. 118. It follows that the judgment must be affirmed, since the action was begun after the note had become more than three years old, and after December 1, 1897.

Judgment affirmed.

KANTNER vs. PRICE.

Act of March 24, 1818. Act of June 20, 1883. Assignment for benefit of creditors. Ejectment.

STATEMENT OF THE CASE.

On Aug. 17, 1897, Wm. Koller, residing in Cumberland county, made an assignment for the benefit of creditors to Samuel Hoover. The deed was recorded in the county of Franklin, where Koller owned a farm, on Aug. 20th, and in Cumberland county on Sept. 17th. Koller having been indebted to Kantner, was sued by the latter, who, on Jan. 11, 1898, obtained a judgment for $800 in Franklin county, and on this judgment caused a sheriff's sale of the land in that county, becoming the purchaser; meantime Hoover made a sale of the land to Price under an order of the court for the discharge of liens. This is ejectment by Kantner to recover the possession.

ADAMSON and MCGUFFIE for plaintiff.

Sale of Hoover, the assignor, was void; the deed was not recorded as provided by Act of March 24, 1878. The place of residence of the assignor determines validity of assignment. Trickett on Assignments, page 13; Reigart's Appeal, 4 Barr 477.

OSBORNE for defendant.

Where land is sold in another county at sheriff's sale under judgment against the assignor, subsequent to the assignment, a purchaser with notice takes no title as against assignee. Follweiler v. Lutz, 102 Pa. 583.

OPINION OF THE COURT.

The Act of March 24, 1818, relating to assignments for the benefit of creditors, provides that "all assignments which shall not be recorded in the office for recording deeds in the county in which the assignor resides within thirty days after the execution thereof, shall be void."

An Act, approved 20th June, 1883, provides for the computation of time, as follows: "That where by existing law or rule of court, or by any law or rule of court that may hereafter be enacted and made, the performance or doing of any act or duty, matter, payment or thing shall be ordered and directed * * * * and the period or duration for the performance or doing thereof shall be prescribed and fixed, such time in all cases shall be so computed as to exclude the first and include the last days of such prescribed or fixed period or duration of time."

The deed in the present case was recorded in Cumberland county, where the assignor resided, on September 17th, that is, on the thirty-first day after it was executed. Under the provision of the Act of Assembly above referred to, it is void. This was not cured by a record of the same in Franklin county at an earlier date, and within thirty days.

"Recording in the county where the land lies is no substitute for the recording of the same in that in which the assignor resides, as required by the Statute." Reigart's Appeal, 4 Pa. 479.

"Where not recorded, as required by the Statute, it may be avoided by the creditors." Weber v. Samuel, 7 Pa. 499; Wallace v. Warnwright, 89 Pa. 263.

In Follweiler v. Lutz, 102 Pa. 585, cited and relied upon by the defendant, the deed had been fully recorded in the county where the assignor resided.

The judgment recovered by Kantner was therefore a valid lien on the farm of Koller, and the sale of it on execution, and purchase thereof, vested in him a good title to the same.

The order of the court to Hoover, and sale by him to Price, were ineffectual to vest the ownership of the land in the latter. The plaintiff is entitled to the land described in the writ.

JACOB ROOP VS. GEORGE MILLAR.

Ejectment. Sheriff's Sale. Instruction of Court. Conditional Verdict.

STATEMENT OF THE CASE.

On a judgment against John Keagy, his land was sold by the sheriff to Jacob Roop for $2,000. Roop, by articles, contracted to sell the land to Wm. McComas for $2,500. Subsequently, McComas transferred his interest in the contract to his brother Jacob, who with what William had paid, paid $1,200 of the purchase money. Prior to the recovery of the judgment against Keagy, he had contracted to sell the land for $1,250 to Jonathan Hope, who paid $750 of the price. Believing Hope's title to be better than McComas', Millar bought it for $800. He subsequently, however, bought McComas' title, paying $900 for it. Roop brings this ejectment to compel Millar to pay the remainder of the purchase money. Roop gave evidence to show that when he bought the premises he had no notice of Hope's contract, actual or constructive. Millar's evidence tended to show that Roop had such notice. Roop sought a verdict conditioned on the payment of the residue of the contract price, $1,300. Millar insisted that all he was entitled to was what remained unpaid on the Hope contract, $500. The Court told the jury that if Roop had no notice of the Hope title he was entitled to verdict conditioned for payment of $1,300. If he had notice, he was entitled to $1,300, less $750. Verdict for Roop, with condition for $1,300. Motion for new trial.

FRANK and LIGHT for plaintiff.

A purchaser at a sheriff's sale is not required to look further than the record. 6 W. & S. 280; 72 Pa. 484. Roop may compel payment of $1,300 by ejectment. Riel v. Connor, 161 Pa. 289. Conditional verdicts are valid. Lauer v. Lee, 42 Pa. 165.

HARPEL and KEMP for defendant.

Caveat emptor applies to sheriff sales. Roop took but the interest Keagy had. Smith v. Painter, 5 S. & R. 225; Freeman v. Caldwell, 10 Watts 9; Weidler v. Bank, 11 S. & R. 134.

OPINION OF THE COURT.

The chief reason assigned for the granting of a new trial is that the instruction to the jury was erroneous. The instruction in substance was that if Roop, the plaintiff and purchaser at the sheriff's sale, had no notice of the contract between Hope and Keagy, he was entitled to a verdict conditioned for the payment of $1,300; if he had notice of the contract, he was entitled to a verdict conditioned for payment of $1,300, less $750. Or in other words, that, if Roop had notice, Millar could set off the $750 paid on the contract by Hope to Keagy, and if Roop had no notice this could not be set off and the plaintiff was entitled to a verdict for the full $1,300.

As a general rule the doctrine of *caveat emptor* applies to judicial sales and the purchaser acquires whatever interest the defendant in the judgment had, yet this rule has its limitations, and in the American and English Encyclopedia of Law, 22 Vol. p. 634, it is laid down that "the purchaser at a sheriff's sale is protected from claims acquired before judgment by third persons from the execution defendant, whereof he had not actual or constructive notice."

The same doctrine is upheld in Newman v. Davis, 24 Fed. Rep. 609; also Goepp v. Gartiser, 35 Pa. 130.

The jury having found, as a matter of fact, that Roop had no notice of the Hope contract, we can see no good reason for disturbing their finding. It was Millar's duty to satisfy the jury that Roop had notice of the contract between Keagy and Hope. Mulliken v. Graham, 72 Pa. 490. Not having done so, we cannot assist him by ordering a new trial.

Counsel for the defendant contended that the conditional verdict was invalid;

the validity of these verdicts is sustained in Lauer v. Lee, 42 Pa. 165.

The new trial is therefore refused.

W. ALFRED VALENTINE, J.

JOHN BANDEL vs. CHAS. RANDAL, OWNER, AND JAMES SANDEL, CONTRACTOR.

Sci. fa. to enforce mechanics' lien.

STATEMENT OF THE CASE.

Randal, owning a tract of land, contracted with Sandel to erect twenty-four houses on it, twelve fronting north on A street and twelve south on B street. He intended to lay out a small street, fourteen feet wide, at the rear of these two sets of lots. After the cellars were dug of all the twenty-four houses the fourteen-foot street was staked off, and then the buildings were commenced. Sandel contracted with Bandel to furnish all the hardware for the houses. This he did, his bill amounting to $1,800. The contract called for a three months' credit. Not receiving payment within the three months, Bandel filed a single lien against the twenty-four houses, apportioning the bill among the two sets of houses on the ratio of $1,000 and $800, the houses on A street having the more expensive hardware. Upon each house on B street he apportioned $66.66⅔. Subsequently Randal sold eleven of the houses on B street, and the liens thereon were paid out of the purchase money. This *sci. fa.* is to enforce payment against the twelfth house, still owned by Randal.

E. H. BROCK and SAMUEL E. BASEHORE for plaintiff.

1. Houses situated on a single lot, a number of which fronting on one street and a number on another street, are subject to an apportioned lien. 20 Pa. 443.

2. A contractor has the right to file an apportioned lien against two or more buildings owned by the same person. Act March 30, 1831; P. L. 242, ¾4.

3. One apportioned lien may be filed against buildings situated on the same lot. Gordon v. Norton, 186 Pa. 180; Mill Co. v. Greenawalt, 11 Pa. Superior Ct. 161.

JOS. RHODES and H. P. KATZ for defendants.

1. A mechanics' lien filed against distinct blocks of buildings, separated by streets, is null and void upon its face. French v. Kaign, 3 W. N. C. 495; Geopp v. Gartiser, 35 Pa. 130.

2. Where there is an interval, however small, between two houses or sets of houses, an apportioned claim cannot be sustained. Fitzpatric v. Allen, 1 Phila. 372.

3. When material is furnished in exclusive reliance on the contractor or owner himself no lien can be created. 135 Pa. 604; 24 Pa. 507.

OPINION OF THE COURT.

In this case, a single lien was filed against twenty-four houses, the property of the same owner, twelve of which faced on A street and twelve on B street. These two blocks of houses were separated by a plot of ground fourteen feet wide, which the owner had staked off with the intention that it should be a street. The plaintiff apportioned his bill among the two blocks of houses on the ratio of $1,000 and $800, one block containing the more expensive houses. Upon each house on B street he apportioned $66.66⅔. Eleven of the houses on B street were sold, and the liens paid out of the purchase money. Upon failure to receive payment for the twelfth house, the plaintiff issued a *sci. fa.* to enforce payment.

Whether or not this was a valid lien, depends upon the question, Were the two blocks of houses separated by a street? In other words, did the acts of the owner, namely, the staking off of this strip of ground and the sale of eleven of these houses, which, with their lots, extended to this fourteen-foot strip, coupled with his intention that it should be a street, constitute a dedication of it as such?

In McCall v. Davis, 56 Pa. 431, it was held, that where an owner of ground lays it off into town lots, with streets and alleys for their convenient use, and sells his lots accordingly, it is a dedication of these ways to the use of the purchasers.

In the Appeal of Ferguson and wife, 117 Pa. 426, Justice Paxson said: It is a well settled principle of law, that where, upon a sale of lots, reference is made to a map or plan upon which they are laid down, and which calls for certain streets and alleys, this constitutes a dedication of these ways to the use of the purchasers as public ways.

It was ably argued by the learned counsel for the plaintiff that the deeds for the

sale of these houses may not have called for the middle of this fourteen-foot plot as the boundary. Be that as it may, the court is of the opinion that, whether the deeds called for the middle or the side of this plot, it makes no difference so far as the dedication is concerned, for in 1 Hill 191, in the matter of opening Thirty-ninth street, New York, it was held that an owner dedicates his adjoining land as the site of a street, whether he bounds the land sold by the centre of the street or the side thereof.

In Quicksall and Lee v. City of Phila., 177 Pa. 301, it was held, that a sale of lots according to a plan which showed them to be on a street implies a grant to or covenant with the purchaser that the street shall be forever open to the use of the public, and operates as a dedication of it to the public use. The right passing to the purchaser is not the mere right that he may use the street, but that all persons may use it.

Again, in Higgins v. Borough of Sharon, 5 Superior Ct. 92, the court held, that where an owner makes a plot, on which spaces are left indicating the dedication of streets not previously projected by the public authorities, and sells lots with reference to the plot, he cannot recall his dedication. In harmony with the above decisions are *In re* Pearl street, 111 Pa. 565; Griffin's Appeal, 109 Pa. 150, and Trickett's work on Penna. Road Law, 432-605.

Since we have decided that these two blocks of houses are separated by a street, it is indisputable, we think, that there cannot be an apportionment of this claim, and therefore the lien against the twelfth house is invalid. In Schultz v. Asay *et al.*, 2 Pennypacker 411, Judge Thayer said: "There is no case which holds that either joint or separate apportioned claims can be filed against houses not adjoining in any sense, but which were separated by streets, and therefore situated in different blocks, or which decides that any right of fixing and charging the amount of a claim by the process of apportionment, exists in cases of houses so situated."

In 3 W. N. C. 495, it was distinctly decided that a material man cannot maintain a claim which rests upon an apportionment made between houses in different blocks, because such apportionment is within neither the reason nor letter of the Acts of Assembly, nor any previous decisions.

WM. H. TAYLOR, J.

So far as the right to apportion claims for materials among several houses depends upon statutory authority, it is clear that the Acts of Assembly contemplated only "houses and buildings adjoining each other" as proper subjects of such apportionment, and the reason assigned for permitting the apportionment in the Act of 1831, is, that as to houses so situated "it sometimes happens that it is impossible for the person who has provided material to specify in his claim the particular house or building for which the several items of his demand were provided." Both the Acts of 1836 and 1850, where they speak of the apportionment, clearly refer to the apportionment previously authorized; that is, to the apportionment provided for in the Act of 1831, and not to any new or different kinds of apportionment.

The case of Pennock v. Hoover, 5 Rawle 291, where the claims were made under the Act of 1806, and its supplement of 1808, was the case of a claim filed against contiguous houses, and it was held that claims against such houses might be filed against all the houses jointly, or they might be apportioned and separate claims filed against each. In Davis v. Farr, 1 Harris 167, and Harper v. Keely, 5 Harris 234, it was held that either joint or separate apportioned claims may be filed against adjoining houses. But there is no case, so far as we can find, which holds that either joint or separate apportioned claims can be filed against houses not adjoining in any sense, but which are separated by streets, and therefore situated in different blocks, or which decides that any right of fixing and charging the amount of a claim by the process of apportionment exists in the cases of houses so situated. The reason assigned by the Act and by the cases for permitting a charge by apportionment, does not exist in such a state of things, for as was said in Chambers v. Varnall, 3 Harris 265, it is as easy to distinguish between separate blocks as it is between separate houses in different streets.

In Goepp v. Gartiser, 35 Pa. 130, and in the subsequent case of French v. Kaign,

3 W. N. C. 495, it was distinctly decided that a material man cannot maintain a claim which rests upon an apportionment made between houses in different blocks, because such an apportionment is neither within the reason nor the letter of the Acts of Assembly, nor within any previous decision.

If this is an accurate statement of existing law, it is obvious that, if the so-called street is legally a public street, the claim as filed is invalid, inasmuch as it is filed for distinct and separate sets or blocks of houses. We are of the opinion, however, that the street is not a public street; reaching this conclusion by a strict adherence to the facts as given to us.

In Kline's Appeal, 93 Pa. 422, cited by the learned counsel for the plaintiff, a tract of land was divided by its owner into ten building lots fronting on a street. On these lots ten houses were built, two houses adjoining each other, making five blocks of two houses. Between two of these blocks an additional space of 60 feet was left intended for a street. Liens were filed against the whole row, which were apportioned among the ten houses. It was objected that the liens could not be so apportioned because of the separation of the houses by this 60 feet space. It was held that the rights of the mechanic with reference to apportionment were to be determined by the time when the work was commenced, and as the space had not then been dedicated as a public street, the liens were properly apportioned.

In the case at bar, the street was staked off but nothing was said as to whether it was opened or not. In the case just cited it was said, "At the time the tract or piece of land was laid out the 60 feet were intended for a street, but when the buildings were begun, and up to the time when they were finished and liens filed, no street was laid out and *opened*, and none has been to this day." See also Alkinson v. Shoemaker, 151 Pa. 153. There is another element, however, to be considered, viz.: The selling of lots after the street was staked off. There are numerous decisions which hold that where a tract of land is divided into lots and new streets laid out, such streets become public if the different lots sold are described as bounded by those streets. Nothing is said in the statement of facts as to whether the lots were sold with reference to a plot or map, or if they were bounded by this street. They may have been sold with no reference whatever to the prospective street. We think that if this fact can be regarded as evidence at all, it tends more to support the theory that the so-called street was intended for a private-way or passage-way for the use of the purchasers of the respective lots. In Trickett on Penna. Road Law, page 603, we find the statement "To constitute a dedication there must be an intention on the part of the owner to confer on the *public* the right of way, and this intention must be manifested by appropriate acts." Nothing is said as to whether it was intended for the public; it was never opened to or accepted by the public, and in view of these facts we cannot regard it as a public street.

There remains the question whether the unequal apportionment between the two sets of houses is valid. Upon principle it is clearly so. The houses on A street contained the more expensive hardware and should receive a larger apportionment on that account than the houses on B street. We are not compelled, however, to resort alone to principle, but have good authority to sustain this view. In Fitzpatrick v. Allen, 20 P. F. S. 292, a lien was filed against twenty houses; ten on C street, and ten on M street; the claim was for roofing, and amounted in the whole to $751.57; the lien was apportioned, viz: $49.41 on each of the C street houses, and $25.75 on each of the M street houses. The *sci fa* was on the lien against one of the M street houses, and it was enforced.

We are of the opinion, therefore, that the lien is valid, and that the *sci fa* should be enforced.

H. STANLEY WINLACK, P. J.

JOHN JUDSON vs. HENRY SALOP.

Duress and undue influence.

STATEMENT OF THE CASE.

Charles Salop, father of Henry Salop, and grandfather of Judson (a son of Chas. Salop's deceased daughter) owning a farm, orally promised gratuitiously to convey it to Henry. Judson learning of the promise, and dissatisfied because he would lose

a share in the land if Charles Salop carried out his purpose, expressed his discontent to Henry and threatened "to make such a fuss around grandfather's ears" as would cause him to change his mind. After some importunity, he at last procured from Henry Salop the following paper:

"I hereby agree that if my father conveys the farm on which he now lives to me prior to his death, I will at once make a deed for the third of it, bounded as follows, (here are given the boundaries) to my nephew John Judson, in fee simple."

[Seal] HENRY SALOP.

The conveyance was made to Henry, and immediately he notified his nephew that he repudiated his agreement. The one-third which he agreed to convey to Judson was worth $2500. Assumpsit.

H. S. WINLACK and W. B. GERY attorneys for plaintiff.

1. The rule supported by reason and by weight of authority, is that the question of duress *per minas vel non*, is one of fact in the particular case, and is for the jury. Griffith v. Sitgreaves, 90 Pa. 161; Feller v. Green, 26 Mich. 71.

2. It is not impossible for parties to enter intentionally into a binding gratuitous promises.—Aller v. Aller, 40 N. J. L. 446; Candor's Appeal, 27 Pa. 119.

E. TAYLOR DAUGHERTY and H. M. COLLINS attorneys for defendant.

1. A sale of a mere expectancy is void at law but may be enforced in a Court of Equity, when founded upon a sufficient consideration.—Baylor v. Com., 40 Pa. 37; Power's Appeal, 63 Pa. 443.

2. Equity will not grant its peculiar remedy of specific performance, nor exercise any power over contracts, when the promises are without consideration, even though they were under seal.—Clark on Contracts, page 366; Smith v. Wood, 12 Wis. 425.

OPINION OF THE COURT.

This action in assumpsit is brought to enforce the specific performance of a contract, under seal, given by Henry Salop to John Judson, by which the former agreed to convey to the latter, one-third of a certain farm which Salop's father had orally promised to convey to him. This agreement was conditioned upon the fulfillment of the father's promise and was educed by expressions of discontent, importunity and threats on the part of Judson, (who was the son of the elder Salop's deceased daughter,) "to make such a fuss around grandfather's ears" as would cause him to change his mind. This conduct on the part of Judson was due to a fear that if his grandfather carried out his purpose to convey the farm to Henry Salop, he (Judson) would be precluded from sharing in Charles Salop's estate. It may be well to here indicate what position the courts have taken with reference to the use of this form of action for the enforcement of specific performance. A considerable number of cases bear us out in the statement that assumpsit is in its nature an equitable action, and in accordance with this principle it has been laid down that specific performance in the action of assumpsit, covenant or debt (now assumpsit under act of May 25, 1887, P. L. 271) is enforced by a verdict for the value of land or such other sum as will compel the execution of the contract of the vendor, to be released on the tender and filing of a sufficient deed according to the terms of the contract. Findlay v. Kein, 62 Pa. 112; Haftzinger v. Roth, 93 Pa. 448. The defense in this action, set up by Henry Salop, involves these points: that the defendant was induced to make the promise contained in the agreement by means of duress and undue influence; that there was not a sufficient consideration for the promise, and that it is contrary to the policy of the law to enforce contracts for the conveyance of estates in expectancy.

We have been unable to discover from the facts submitted any of the qualities which go to make up duress or undue influence. This point is therefore dismissed.

We recognize that it is a general principle of the law, that a seal when affixed to a written agreement imports a consideration, by virtue of its form, and that it is not impossible for parties to enter into binding gratuitous promises. We bear in mind, too, the principle that equity will not grant its peculiar remedy of specific performance * * * where the promises are without consideration, even though they are under seal. Baylor v. Com., 40 Pa. 37. So in this action of assumpsit, equitable in its nature, as we have seen, it is for us to look into the transaction and the circumcumstances attendant upon the giving of the instrument in question and to determine whether or not ulterior to the mere

making of the specialty, there was such consideration as would invoke the aid of equity in securing the enforcement of the contract. Upon close examination of the facts, we conclude that a sufficient consideration was present in the contemplation of Henry Salop, in the fact of the likelihood that his father, Charles Salop, would convey his farm to him, and the additional fact that John Judson would forbear "to make such a fuss around grandfather's ears" as might cause him to change his mind. If Charles Salop should have, or could have, been induced to die intestate, under the law, Judson, as the representative of his deceased mother, the daughter of Charles Salop, would have shared equally with his uncle, Henry Salop, in the distribution of his grandfather's estate. So it was, evidently, in the mind of Henry Salop that should Judson approach his grandfather in this matter, the old man might be induced to change his mind and make some provision for his grandson in the disposition of his estate. It was therefore entirely proper for Salop and Judson to enter into any compromise which might be acceptable to them. There can, then, be no further question as to the sufficiency or validity of the consideration necessary to support the contract.

As to the matter of the agreement to convey an estate in expectancy, it has been laid down, that the sale of a mere expectancy is void at law but may be enforced in a court of equity when founded upon a sufficient consideration. Baylor v. Com., *supra*. Bispham's Equity, § 164 & cases cited. Having decided upon the point of sufficiency of consideration, this point is therefore disposed of.

Having determined that the contract in question is a valid one, binding force will be given it. The court therefore directs the jury to render such a verdict as shall compel the execution of the contract, the money allowed plaintiff not to exceed the value of the one-third of the premises, with interest, Henry Salop, said defendant, to be released from the payment of said amount, upon the tender and filing of a sufficient deed, according to the terms of the contract.

By the Court.

A. F. JOHN, P. J.

OPINION OF THE SUPREME COURT.

The intestate law would have given to John Judson and to Henry Salop undivided halves of the land in question. A gratuitous conveyance by Charles Salop to the latter would have given him all, and left nothing for the former. The dissatisfaction of Judson was neither surprising or unreasonable, and he had a right to expostulate with his grandfather, and, if he could, to cause in the grandfather the abandonment of a purpose so disastrous to him. In order to avoid the possible, perhaps probable, result of this expostulation, Henry Salop promised to convey one-third of the land, one-sixth less than the intestate law would have given him, to John Judson. No difficulty in enforcing this promise is presented by the statute of fraud, for it is in writing. The consideration is not mentioned in the writing, it is true, but that is unnecessary.

Why, then, should the contract not be enforced? It is far from gratuitous. In reliance upon it, Judson refrained from exercising a right, the exercise of which might have won for him one-half of the land. This was a detriment to him, and a corresponding benefit to Henry Salop.

It is not necessary that we regard the assumpsit as a substitute for a bill for specific performance. The contract has been broken, and at law an action accrues to one party to a contract, on its breach by the other, for damages, whether the subject thereof be realty or personalty. Had a money price been payable by Judson, the damages would have been the difference between that price, if not paid, and the value of the land. The consideration has, in fact, been given and cannot be returned by Henry Salop. The value of one-third of the land represents the damages which Judson has suffered, on account of Salop's refusal to comply with his contract. It is clear, we think, that Judson is entitled to recover that value, or $2,500.

Judgment affirmed.

COM. vs. WM. JONES.

Libel—Motion for a new trial.

STATEMENT OF THE CASE.

In the Twelfth Judicial district of Penn

sylvania, Wm. Roberts was nominated by the Democratic party for the office of President Judge. A newspaper, published in Harrisburg, but circulating more widely in Cumberland, Adams, Perry and Lancaster counties than in Dauphin, issued after the nomination but before the election, contained the declaration that Roberts had on one occasion committed the theft of a deed and other papers. The issue was, as usual, sent into all the counties named. The Commonwealth did not show the untruth, nor did the defendant show the truth, of the charge. But evidence was offered to show that the publication was made after due inquiry, and with a view to prevent an unfit person being chosen to the office. The court excluded the evidence as irrelevant. Motion for a new trial.

C. S. DAVIS and D. F. DEAL for Commonwealth.

1. To constitute libel, the statements must be published maliciously. Barr v. Moore, 87 Pa. 385; Pittoch v. O'Neill, 63 Pa. 258.

2. Certain publications are privileged if the circumstances under which they are made rebut the inference of malice. McGraw v. Hamilton, 184 Pa. 108.

W. S. CLARK and R. F. BORYER for defendant.

1. It is the province of the court, and not the jury, to determine whether the matter is proper for public investigation under the section. Com. v. Murphy, 8 Pa. C. C. 399; Com. v. Singerly, 15 Phila. 368.

2. The matter in this case was proper for public investigation. Com. v. McClure, 1 Pa. C. C. 207; Com. v. Rudy, 5 D. R. 270.

OPINION OF THE COURT.

It is provided by the seventh section of Article I of the Constitution of our Commonwealth that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of offices or men in public capacity or to any other matter, proper for public investigation or information where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

Roberts was a candidate for Judge in the district where the newspaper of the defendant was published. The voters had a right to be fully acquainted with his character and attainments in order that they might be able to intelligently pass upon his qualifications and fitness for the position he sought. That a public journal is a proper medium through which to communicate with them will be conceded. If Roberts had been guilty of the offence as charged, it will not be denied that it will be a proper reason for a refusal to support his candidacy. His moral character was a most important consideration in determining whether he was entitled to receive the suffrages he was seeking.

We think, therefore, that the publication was on a proper occasion, and unless malicious or not based upon reasonable or probable cause was a privileged one. While we are of the opinion that the matter was a proper one for public investigation or information, yet it was incumbent upon the defendant, who had thereby charged Roberts with having committed an indictable offence, to show to the satisfaction of a jury that the publication was maliciously or negligently made. This he offered to do but the evidence was rejected by the court.

Adjudications made in the following cases since the adoption of the Constitution of 1874 clearly established the law as to privileged communications in Pennsylvania. Commonwealth v. Singerly, 15 Phila. 398; Briggs v. Garret, 111 Pa. 404; Conway v. Times, 139 Pa. 334; Com. v. Place, 152 Pa. 314; McGaw v. Hamilton, 134 Pa. 108.

In the light of the decisions in these cases, we are satisfied that it was error not to receive the evidence offered by the defendant to show the motive that prompted him to make the publication and that it was not made until after due inquiry had been had as to the truth of the charge embodied therein.

A new trial will therefore be granted.

HOPE HOLLIS vs. JAS. KAMES.

Assumpsit.

STATEMENT OF THE CASE.

Adam Hoover devised his land to "my son, John, for life, and at his death to his children, if any he shall have." John, after the testator's death, married, and a son was born to him, who lived four months and died. Two years later a sec-

ond son, Jacob, was born. John desired to sell the farm, and, uniting with the guardian of Jacob, petitioned the orphans' court for leave to sell it. Leave was granted, and the land sold to Kames for $5,000. This is assumpsit by Hollis, the guardian, whom the court made trustee to effect the sale. Kames denies the jurisdiction of court. The sale was made under the Price act of April 18, 1853.

WALLACE and MITCHELL for plaintiff.
STAUFFER and MEARKLE for defendant.

OPINION OF THE COURT.

The only question in this case is, Will Kames get by the sale a good title in fee simple to the land bought by him? If he will, he has no defense. If he will not, he will not be compelled to pay the amount bid by him. Westhafer v. Koons, 144 Pa. 26.

The sale was under the Act of April 18, 1853, 2 P. & L. 4046. Power is conferred on the courts to order a sale by that act only when certain conditions exist. In the absence of such conditions a sale would be void, for want of jurisdiction in the court ordering it. We must ascertain whether the court had jurisdiction. The common pleas has the power to make the sales provided for in the act, in all other cases than those in which the "real estate shall have been acquired by descent or last will;" and the orphans' court in cases where the land has been so acquired. The Hoover land has been acquired by its present owners by devise and descent. The orphans' court, if any, had the authority to order the sale.

Among the conditions on which a sale may be ordered are mentioned "whenever real estate shall be held for or owned by minors," and "whenever a decedent's real estate is subject to the lien of debts not of record, whenever real estate shall be entailed, or contingent remainders or executory devises shall be limited therein." Did these conditions exist in the case before us?

The Hoover land has been devised to John Hoover for life, and the remainder to children, and Jacob Hoover is one of these children, and a minor. The first of these conditions therefore exists. We think that the orphans' court had the power, for proper cause, to order a sale of the interest of Jacob. But what was that interest? The devise was to "my son, John, for life, and at his death to his children, if any he shall have." John, at the testator's death, was yet unmarried. Until the birth of a child, the remainder was contingent. As soon as a child was born the remainder vested in him. Keller v. Lees, 185 Pa. 402. Four months later this child died. His whole estate passed to his father, who was of the blood of the perquisitor, Adam Hoover. But, notwithstanding this inheritance of the child's remainder by his father, that remainder would open so as to admit to shares in it subsequently born children. When Jacob was born it was reduced to an undivided half, and Jacob took the other undivided half. On the ground of Jacob's minority, only this undivided half in the remainder could be sold by the orphans' court. Neither the fee in the other undivided half, nor the life estate of John Hoover, could be disposed of by it.

John Hoover has, however, petitioned the court, in conjunction with the guardian of Jacob, and offers a deed in which he unites with the guardian. His interest will, therefore, be acquired by the purchaser, Kames, and can furnish no reason for Kames' refusal to accept the deed.

But will Kames' title be a good one? As the remainder, vested in the first-born son, opened to admit Jacob to a share in it, on his subsequent birth, so the remainder in John, inherited from the first-born son, and in Jacob, will again open to admit any other child or children that may hereafter be born. Has the sale to Kames cut off these floating or contingent remainders in the, as yet, unborn children? If it has, Kames gets all he expected to get, a perfect title in fee simple, and has no good reason for refusing to pay the purchase money. If it has not, his title would be seriously defective. He may hereafter lose a third, a half, three-fifths, two-thirds, or even a larger fraction of the land. Such a title he will not be compelled to pay for.

The contingent remainders in the children that may hereafter be born to John Hoover have not been cut off. The fifth section of the Act of April 18, 1853, 2 P. & L. 4052 conditions the power of the sale to bar contingent remainders by the proviso "that the petition shall set forth an ex-

planation of the title and of the purpose to bar the entail, defeat the contingent remainder," etc. No such purpose is manifested in this petition on which the present sale was ordered. The contingent remainders are therefore not barred. Westhafer v. Koons, 144 Pa. 26; Smith v. Townsend, 32 Pa. 434.

But had the petition mentioned the remainders and declared the purpose to be to bar them, the decree thereon, it seems, would not have been effectual to bar them. In Keller v. Lees, 176 Pa. 402, it is maintained by Green J. that as the whole remainder vests in the children already born, the interest which those subsequently to be born have, are not to be treated as contingent remainders in the sense of that expression in the act of April 18, 1853. No sale under that act could be ordered for the purpose of barring them. The policy of the act, which was to make land alienable despite contingent interests of various sorts, is thus to a degree thwarted, and it is discovered that it affords no remedy in one important class of cases. The decision is recent and by the court of last resort. We are constrained by it to the conclusion that Kames, if he accepts the land, will be exposed to the risk of having his estate in it diminished by the later birth of children of John Hoover. For this reason he will not be compelled to pay the purchase money.

Your verdict, therefore, gentlemen of the jury, should be for the defendant.